



April 26, 2004

Federal Trade Commission
CAN-SPAM Act
Post Office Box 1030
Merrifield, VA 22116-1030

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Ladies and Gentlemen:

Discover Bank is pleased to respond to the Commission's request for comment regarding rulemaking under the CAN-SPAM Act.

Discover Bank maintains total assets in excess of \$19 billion and is among the nation's largest issuers of general-purpose credit cards, as measured by number of accounts and cardmembers. Discover Bank also offers deposit account services to customers across the country, and holds over \$12 billion in consumer deposits. Discover Bank, through an affiliate and through unaffiliated firms, sends commercial electronic mail to customers, and to prospective customers who have opted to receive such messages.

A. Criteria for Determining the "Primary Purpose" of an E-Mail Message

The Commission has requested comment as to how to interpret the term "primary purpose" in deciding whether an electronic mail message is commercial. We believe the term "primary purpose" should be interpreted in accordance with its plain English meaning. Webster's Dictionary defines "primary" as, "of first rank, importance or value : PRINCIPAL (the ~ purpose)". If a recipient has requested to receive non-commercial information via e-mail from a sender with whom they have an established business relationship (e.g., an informational newsletter or notices about their account), we believe that any e-mail responsive to that request should be considered non-commercial, since the primary purpose of the e-mail is to fulfill a request for non-commercial information. The fact that commercial content may be included in such an e-mail should be irrelevant.

For other e-mails, the purpose should be determined by examining, for example, the relative prominence of the advertising or promotional material relative to the combined non-commercial content. We believe the Commission's "net impression" standard would be appropriate with respect to this analysis. We do not believe that the financial support for an e-mail is a relevant criterion on which to determine its primary purpose. The identity of the sender should not be relevant unless the sender has an existing business relationship with the recipient, in which case it is more likely that the e-mail may be solely for the purpose of providing information as a customer service.

B. Transactional or Relationship Messages

The Commission requests comment as to whether any recent developments in online commerce suggest the need to revise what constitutes a “transactional or relationship message.” One important recent development in online marketing practices is that companies increasingly use e-mail to facilitate or complete transactions as to which the recipient has made an inquiry or application, but has not yet entered into a contract. Often these messages are sent with the recipient’s express permission. We believe that the CAN-SPAM Act’s definition of “transactional or relationship message” should be expanded to include messages which are for the primary purpose of facilitating or completing a recipient’s application or request for goods or services, where the recipient has previously inquired as to those goods or services with the sender. For example, loan applicants will sometimes need to abandon an online application with the intention of returning later to complete it. It has been a recent trend for lenders to offer to send the applicant a “reminder” e-mail. Such a reminder, if sent at the applicant’s request, should not be considered a “commercial message.” Similarly, where an existing or prospective customer inquires about a company’s product or service, the company should be able to provide that individual with information via e-mail without the e-mail being considered commercial.

C. The 10 Business Day Time Period for Processing Opt-out Requests

The Commission requests comment as to whether ten business days is an appropriate deadline for honoring opt-out requests regarding commercial e-mails. We believe that ten business days is not an adequate period of time within which to honor opt-out requests. This is particularly true where multiple companies are required to exchange files in order to accomplish the processing. In the context of an e-mail that is being initiated by one company but which is for the sole purpose of advertising for another company, the process of transmitting lists of opted-in and opted-out recipients can be time consuming and is fraught with risks of processing errors and delays. As a result, we believe that a 30-day time period would be more reasonable. This is consistent with the Federal Communications Commission’s rule allowing companies up to 30 days to honor company-specific “do not call” requests. [cite]

D. Identifying Additional “Aggravated Violations”

The Commission requests comment as to whether any conduct not currently listed as an “aggravated violation” should be considered such. We believe that it should be deemed an “aggravated violation” for any company to use another company’s opt-out list for any purpose other than compliance with the CAN-SPAM Act. Companies are rightfully concerned that in making their opt-out lists available to third parties for compliance purposes, those lists may be misappropriated or misused. Heightened penalties for such misconduct would act as a deterrent and benefit both consumers and law-abiding firms.

E. Issuing Regulations Under the Act

1. Multiple Senders

The Commission requests comment on whether more than one person should be regarded as a sender of commercial e-mail if the e-mail contains reference to multiple companies' products or services. We believe that the most reasonable interpretation of the CAN-SPAM Act is that where an e-mail contains multiple advertisements, but the individual advertisers do not control whether the entity originating the e-mail sends it (i.e., the originating entity will send the e-mail with or without a particular advertiser), the advertisers cannot be considered "senders" because they did not "procure" the sending of the e-mail.

2. "Forward-to-a-Friend" E-Mails

The Commission requests comment on whether a sender of a commercial electronic mail message that asks recipients to forward the commercial e-mail to others should be regarded as having initiated commercial e-mails that its customers send to others. We do not believe that the company that is the sender of the first e-mail should be regarded as the sender of subsequent e-mails that recipients may send to others. As a practical matter, the sender of the original e-mail would never know to whom its recipients forward e-mails, or whether those third parties had previously opted-out from the sender's messages. We believe there to be considerable benefit to consumers in permitting such programs because they facilitate the distribution of information to persons who friends determine may be most interested in receiving the information. Accordingly, we believe that companies that participate in "forward-to-a-friend" programs should not be regarded as senders of e-mails that are forwarded by recipients.

3. Definition of "Physical Postal Address"

The Commission requests comment as to whether use of a post office box rather than a street address satisfies the Act, which requires that commercial electronic mail messages include a valid physical postal address of the sender. We believe that the CAN-SPAM Act's requirement of a "valid physical postal address" should be interpreted as including a post office box. There are good reasons for senders not to be forced to include a street address in a commercial electronic mail message. Many companies use post office boxes to manage receipt and distribution of mail to assure accountability and control. The U.S. Postal Service requires renters of post office boxes to provide a physical street address, and is able to provide that information to law enforcement agencies,¹ which should dispense with any law enforcement concern. In addition, many companies are justifiably concerned that the publication of street addresses could

¹ See "A Law Enforcement Guide to Postal Crimes, U.S. Postal Service Publication 146 (Oct. 2003), available at <http://www.usps.com/cpim/ftp/pubs/pub146.pdf>.

needlessly put their employees' safety at risk. We therefore urge the Commission to clarify that a post office box is a valid physical postal address under the CAN-SPAM Act.

4. Subject Line Labels

The Commission is required to prepare a report that sets forth a plan for requiring commercial e-mail messages to be identifiable from the subject line or gives an explanation as to why such a requirement should not be adopted. We urge the Commission not to impose a labeling requirement for commercial e-mail messages. The CAN-SPAM Act already prohibits deceptive subject lines, and requires that all commercial e-mails be clearly identified as advertising. §§ 5(a)(2), 5(a)(4). Labels are therefore not necessary for recipients to be able to assess the content of an e-mail. We are also very concerned that mandatory labeling will result in automatic deletion of commercial e-mail by recipients' Internet service providers. Such a requirement would also benefit spammers who do not comply with the requirement, and have their messages delivered unimpeded. Accordingly, we urge the Commission to oppose a subject line labeling requirement.

Again, we appreciate the opportunity to comment on these issues. We would be pleased to provide any further information you may need regarding these comments.

Respectfully submitted,
Discover Bank

K. M. Roberts
President